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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA, APPELLANT

v.

MARINE BANCORPORATION, INC., NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON TRUST BANK, AND JUSTIN T. WATSON, ACTING COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

JURISDICTIONAL STATEMENT

OPINION BELOW

The district court rendered no opinion; its findings of fact and conclusions of law (App. A, *infra*, pp. 1–3) are not reported.

JURISDICTION

The judgment of the district court (App. B, *infra*, pp. 24–25) was entered on January 31, 1973. The notice of appeal to this Court was filed on March 30, 1973 (App. D, *infra*, pp. 28–29). On May 3, 1973, Mr. Justice Douglas extended the time for docketing the appeal to May 23, 1973. A further extension from May 23 to June 30 was granted by Mr. Justice Douglas on

May 16, 1973. The jurisdiction of the Court is conferred by Section 2 of the Expediting Act (15 U.S.C. 29). *United States* v. *Phillipsburg National Bank*, 399 U.S. 350; *United States* v. *Third National Bank in Nashville*, 390 U.S. 171.

QUESTION PRESENTED

Whether the effect of the acquisition of a leading bank in the concentrated Spokane, Washington, banking market by one of the largest banks in the state may be substantially to lessen competition, in violation of Section 7 of the Clayton Act.

STATUTES INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Subsection 5(B) of the Bank Merger Act of 1966, 80 Stat. 8, as amended, 12 U.S.C. 1828(c)(5)(B), provides in pertinent part:

> The [Comptroller of the Currency] shall not approve——

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

STATEMENT

The United States instituted this civil antitrust action under Section 7 of the Clayton Act (15 U.S.C. 18) challenging the acquisition of the third largest bank in Spokane, Washington, the Washington Trust Bank ("Washington Trust"), by the second largest bank in the State of Washington, the National Bank of Commerce of Seattle ("NBC"), a subsidiary of the Marine Bancorporation, a bank holding company. The complaint alleged that the effect of the proposed acquisition may be substantially to lessen competition because the entry of NBC into the Spokane commercial banking market through the acquisition of the Washington Trust Bank rather than by *de novo* entry or a so-called foothold acquisition of a smaller bank, would eliminate NBC as (a) a potential competitor whose future ability to enter Spokane other than by acquisition of a large market share could effect sub-

stantial deconcentration of that market; and (b) a perceived potential entrant exerting a pro-competitive influence on banks in the Spokane market from its position on the fringe of the market.

The complaint also alleged that the acquisition of Washington Trust, the largest middle-sized bank with headquarters in Eastern Washington and one of the 12 remaining middle-sized banks in the state, would eliminate that institution as a potential competitor in other local markets in the state, would remove one of the few middle-sized banks capable of merging with such other banks and becoming a significant statewide or regional competitor, and would adversely affect banking competition in the State of Washington as a whole by strengthening the dominance of the state's few large banking institutions.

After a trial the district court held that the merger did not violate Section 7 and dismissed the complaint.[1]

A. THE STRUCTURE OF BANKING IN WASHINGTON

Commercial banking is highly concentrated in both the State of Washington and in Eastern Washington, a geographically distinct region comprised of 19 counties and separated from the Western part of the state by the Cascade Mountains. The five largest statewide banking organizations hold 74 percent of the total deposits in the state's 687 commercial banking

[1] Prior to trial, all allegations in the complaint relating to actual competition in commercial banking and correspondent banking were abandoned. The case went to trial only on the potential competition issues detailed above.

offices; the two largest banking organizations operated 51 percent of the offices (GX A–17).

The five largest banks operating offices in Eastern Washington hold 84 percent of the area's total bank deposits and operate 44 percent of its offices (GX A–19). The large bulk of those deposits are in Spokane County (GX A–27), the most populous county in the area, whose total deposits ranked third among all counties in the state (GX A–27).[3] There are nine banking organizations which operate 52 banking offices in Spokane County (GX A–52). The three largest organizations hold 89.6 percent of all commercial bank deposits in the county and operated 75 percent of the offices (*ibid.*).

The City of Spokane and the populated areas immediately adjacent to it, which comprise a part of Spokane County and which the district court found to be the relevant geographic market, is the third most populous area in the state and is the growing economic and financial center of the "Inland Empire," a rich geographic area in the Northwest. The Spokane metropolitan area is served by only six of the nine banking institutions operating in Spokane County. Here, too, the commercial banking business is highly concentrated. The three largest banking organizations hold 92 percent of the area's total deposits (GX A–

[2] Unless otherwise indicated, all figures are as of June 30, 1972. GX refers to government exhibit; P.T.O. refers to Pre-Trial Order; Tr. refers to transcript; Interr. refers to defendants' answers to plaintiff's interrogatories.

[3] Spokane County banking offices held 8.4 percent of the total deposits in the state and 34.7 percent of Eastern Washington's bank deposits (GX A–27).

55) and 92.3 percent of the area's outstanding loans (GX A–58).

B. THE ACQUIRED BANK

Washington Trust, the acquired bank, is the eighth largest bank in the state, the fourth largest bank in Eastern Washington (GX A–19), and the third largest bank in Spokane, where it has 19 percent of the area's total deposits and 17.4 percent of the 46 banking offices located there (GX A–55). Washington Trust is a well-managed and growing banking institution. In the five years preceding the merger its deposits had increased by 50 percent and its market share by 2 percent, while the market share of its larger competitor, Seattle First National Bank, had declined 7 percent (GX A–55). Washington Trust's officers were paid at rates comparable to those paid by the state's largest institutions (GX F–14, 17) and the bank had introduced several new services (Interr. No. 9).[34]

At the time of the proposed acquisition, as a report made for Washington Trust by a banking consultant indicated (GX M), the bank was ready to expand beyond the Spokane market and play a larger role in the state by making *de novo* or foothold acquisitions. The report emphasized the bank's "young eager staff" and its vigorous leadership (GX M–2).

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[34] Washington Trust discussed a possible merger with a thirty million dollar bank in Yakima (Dep. P. Stanton, pp. 18–27); it had options to purchase stock in two other banks in Eastern Washington (Interr. No. 48), and its officers had participated in the organization of a third bank (Dep. P. Stanton, pp. 18–27).

C. THE ACQUIRING BANK

The National Bank of Commerce, a wholly-owned subsidiary of Marine Bancorporation, Inc. ("Marine"), a registered bank holding company, is the second largest banking organization in the State of Washington. As of December 31, 1971, NBC had total deposits of $1.6 billion (22.8 percent of total deposits held by Washington commercial banks), total assets of $1.8 billion and total loans of $881.3 million (GX A-2). NBC operates 107 branch banking offices in Eastern Washington, located in all but two of the 19 counties there (P.T.O. IV).

Although NBC does not operate a branch office in the Spokane metropolitan area, Spokane is a market which NBC has considered attractive and has sought to enter for many years (see, *e.g.*, Tr. 742–743; GX F-27). NBC has knowledge of the Spokane banking business through its past and existing business relationships in that market (P.T.O. IV).[4] As of January 31, 1972, NBC derived $4.4 million in deposits and had outstanding $10.2 million in loans to customers in

[4] NBC operates two branch offices in Spokane County, one in the community of Deer Park, 20 miles north of Spokane, and one in the community of Medical Lake, 15 miles west of Spokane. These two offices located in a rural area had combined deposits of $11.4 million as of January 31, 1972. Although they derived some business from Spokane, they are not part of the Spokane commercial banking market. Another Marine subsidiary, Coast Mortgage Company, a mortgage banking firm, entered the Spokane market in 1972 after the Board of Governors of the Federal Reserve System authorized Marine to open a branch office of Coast Mortgage in Spokane. The Board had previously denied it permission to acquire a Spokane mortgage banking firm (P.T.O. VIII, Exhs. E & F, pt. II).

Spokane. In its 1970 annual report, Marine reported that with the proposed merger, NBC was within "sight of one of its long sought goals; representation in the city of Spokane * * *" (GX D–1).

D. STATE BANKING LAW AND THE AVAILABLE MEANS OF ENTRY INTO THE SPOKANE MARKET

Washington law permits banks to open branches only in (1) the city in which their headquarters is located; (2) the unincorporated areas of the county in which their headquarters is located: and (3) incorporated communities which have no banking office. Branching into other areas is permitted by the acquisition of an existing bank or banking office. Banks in the State of Washington have, however, achieved *de novo* entry into areas foreclosed to *de novo* branching by sponsoring the organization of an affiliate bank, and later acquiring the bank. This method of expansion is a legal (Tr. 732–733) and a well-recognized practice used by large statewide banking organizations (GX I, Tr. 280–298) and recognized by the federal banking authorities (GX H).

Since NBC's headquarters is in Seattle, it is legally barred from opening a branch in Spokane. In order to enter the city, it would have to make some kind of acquisition. Apart from entry by purchase of a large market share, the method attempted in this case, there were two significant possibilities: acquisition of a sponsored bank formed by its officers, directors or their associates as an independent firm to be assisted by NBC until acquired and converted into a branch; or acquisition of a smaller "foothold" bank.

In the last decade, the sponsored bank procedure has become an established method by which national banks enter new markets in Washington. The sponsored bank must first be chartered by the Comptroller as an independent bank. It must be operated for a period of time as a *bona fide* and independent institution, although it may be affiliated with its sponsor for purposes of correspondent relationships and other inter-bank services, including financial support. It may be acquired by its sponsor, with the Comptroller's consent, after it has become established in the banking structure of the community it serves.[5]

E. THE PROCEEDINGS

1. *Agency Reports and the Comptroller's Decision.* In February 1971, Marine, NBC and Washington Trust agreed to merge the latter into NBC and sub-

[5] The record contains numerous examples of decisions by the Comptroller approving acquisitions by national banks in Washington of their own sponsored affiliates. A deposition by the Chairman of Washington Bankshares, Inc., the holding company for Old National Bank of Spokane, describes at least five acquisitions of this kind by the latter (Tr. 280–298). Moreover, NBC itself sponsored the formation of an affiliate in a strategically-located shopping center near three towns in South-Central Washington. The record shows that NBC did so with the purpose, as yet unrealized, of acquiring the affiliate as a branch (Tr. 730–731; GX J–20, 37, K–36, 70, 93; Dep. A. Price, pp. 71–72, 101; Dep. D. Loney, pp. 43–44.

There are no state court decisions on the validity of this practice. Under RCW 30.08.020(7), a state chartered bank may not, except with consent of the Supervisor of Banking, agree to be acquired for 10 years after it is chartered. This does not apply to newly sponsored national banks, which are chartered under federal law, and therefore does not bar use of this device by NBC.

sequently applied to the Comptroller of the Currency for formal approval of the merger. Pursuant to 12 U.S.C. 1828(c), the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Department of Justice furnished reports on the competitive effects of the proposed merger. The Board of Governors concluded that the merger "would increase the already high level of concentration of banking resources in Washington" (P.T.O. I, Exh. C) and that the overall effect on competition would be adverse. The FDIC reached a similar conclusion (*id.*, Exh. D). The Department of Justice reported that the proposed merger would have a "significantly adverse effect on competition" (*id.*, Exh. B). The Comptroller, however, approved the merger on September 24, 1971 (*id.*, Exh. A).

2. *The District Court's Decision.* On October 22, 1971, the United States filed its complaint challenging the merger. Consummation was stayed automatically pursuant to 12 U.S.C. 1828(c)(7)(A), pending the termination of the suit. The Comptroller of the Currency intervened as a party defendant under 12 U.S.C. 1828(c)(7)(D).

After an eight-day trial the district court announced from the bench its intention to dismiss the complaint (App. E, *infra*, pp. 30–40). The court subsequently adopted, without change, the defendants' proposed findings of fact and conclusions of law. These findings rejected the claim that banking in the Spokane metropolitan area was concentrated. Although three banks held 92 percent of the area's deposits, the district court concluded that "*other* structural factors * * *

together with the actual performance of the market," as observed by defendants' experts established that regardless of market share data Spokane was a "highly competitive market" (App. A, *infra*, pp. 10–11).

The district court also found no likelihood that NBC would enter Spokane *de novo* or by foothold acquisition and that there was no feasible method available by which NBC could enter Spokane other than by acquiring Washington Trust (App. A, *infra*, pp. 6–10). It found that no bank office or bank was available for acquisition that was reasonably acceptable to NBC (App. A, *infra*, p. 7). In addition, the court found that Spokane's growth would be too slow to justify "starting from scratch or by forming a minimal foothold" (App. A, *infra*, pp. 8, 9). It also found that entry *de novo* or by foothold acquisition would have little impact (App. A, *infra*, pp. 9–10).

The district court rejected the claim that the elimination of a vigorous independent middle-sized banking institution capable of entering other markets in the state or merging with other banks of similar size, would tend substantially to lessen competition. The district court found there was no "reasonable probability that WTB will expand into other banking markets in Eastern Washington or that WTB has the incentive or capability to do so," and there was not any "reasonable probability" of Washington Trust's combination with other middle-sized banks (App. A, *infra*, p. 11).

The district court also rejected the contention that the merger would adversely affect banking in the State of Washington by strengthening the dominance of the

state's few large banking institutions. Since banking is an inherently local business, neither the state nor Eastern Washington "constitutes a commercial banking market or a relevant geographic market" within which to consider competitive effects (App. A, *infra*, p. 4). The court also found there was no likelihood that the merger would trigger further mergers, because the regulatory authorities would prevent mergers that are not in the public interest (App. A, *infra*, pp. 11–12).

Finally, the court found that the benefits to the "convenience and needs" of the Spokane community that the proposed merger would provide clearly outweighed any anticompetitive effects it might have. Under the Bank Merger Act of 1966, 12 U.S.C. 1828 (c)(7)(B), this finding constitutes an affirmative defense to a merger that otherwise would violate Section 7. The "convenience and needs" finding was based on the effects of the merger in eliminating Washington Trust's competitive disadvantage from being unable to offer all the services being offered by the largest banks in Spokane, such as international banking, government insured mortgage financing, and student loans (App. A, *infra*, pp. 12–22).

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents the same important legal issues that were presented in *United States* v. *First National Bancorporation*, No. 71–703, in which this Court noted probable jurisdiction (405 U.S. 915) but, after oral argument, affirmed by an equally-divided Court (February 28, 1973). They involve the application of Section 7 of the Clayton Act to the acquisition by a

large bank of a major bank in a concentrated significant market in which the acquiring bank is a potential entrant.

The questions are important because the United States has frequently invoked the doctrine of potential competition in an effort to stem the rapidly accelerating trend toward banking concentration resulting principally from the acquisition by large dominant statewide banks of major banks in a state's leading local banking markets. Although such acquisitions do not change existing market shares, they are likely significantly to affect market structure and behavior by eliminating the potential competition of the acquiring firm. This Court recently reiterated that a merger that eliminates the acquiring firm as a significant potential entrant into the market may substantially lessen competition in violation of Section 7 of the Clayton Act. *United States* v. *Falstaff Brewing Corp.*, No. 71–873, decided February 28, 1973. The application of this doctrine to bank mergers is an important question that warrants plenary consideration by this Court, in order to provide guidance to the Department of Justice, to the bank regulatory agencies and to the banking industry. Indeed, this Court recognized the importance of the issue when it noted probable jurisdiction in the *First National Bancorporation* case.[6]

[6] Following this Court's decision in *First National Bancorporation*, two other district courts have decided potential competition banking cases adversely to the government. *United States* v. *Connecticut National Bank, et al.*, D. Conn., Civ. 14583, decided June 22, 1973; *United States* v. *United Virginia Bankshares, E.D. Va.*, Civ. 85-70-A, decided March 20, 1973.

The government has decided not to appeal the *United Vir-*

1. Under Section 7 of the Clayton, "potential competition" is significant to the preservation of actual competition in concentrated markets, and a merger which eliminates a significant potential competitor violates that section. See *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158; *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568; *United States* v. *Continental Can Co.*, 378 U.S. 441, 464–465; *United States* v. *Falstaff Brewing Corp.*, No. 71–873, decided February 28, 1973. Potential competitors on the edge of such a market with capability and incentive to enter it are competitively important because they are a source of future deconcentration by independent entry, and because their position is an external factor influencing the conduct of those already in the market. *Ibid.*

a. In this case, the National Bank of Commerce was a significant potential entrant in the Spokane market. The district court's contrary finding resulted principally from its failure to apply the proper standards in deciding that issue.

Although NBC's capability to accomplish *de novo* entry was shown by its substantial resources and history of expansion,[7] NBC claimed that it would enter

ginia Bankshares case; it has not reached a decision whether to appeal the *Connecticut Bank* case.

Another bank-merger case involving potential competition is pending in the district court. *United States* v. *Bankers Trust of South Carolina*, D.S.C., Civil 72–830.

[7] Such a *de novo* entry does not conflict with the state branching policy (*supra*, pp. 7–8) for two reasons. First, the chartering of a national bank as a sponsored affiliate of another national bank is not limited by that policy, so long as the new bank is a *bona fide* independent bank under the criteria of the National Bank Act. *Camden Trust Co.* v. *Gidney*, 301 F. 2d 521 (C.A.D.C.), certiorari

only by acquiring immediately a large market share, since it would be unprofitable for it to enter *de novo* because of the cost of providing a full service banking operation.[8] It presented no supporting evidence, however—such as earnings projections or analysis of the kind of deposit base and facilities required—to substantiate the claim.

The determination with respect to potential competition in a Section 7 case should not turn on such subjective, self-serving statements; the status of a firm as a potential entrant must be ascertained on the basis of objective evidence showing the potential entrant's financial capability to enter independently, its economic incentive to do so, and the reasonable prospects for making such an entry successfully. Thus, in *United States* v. *Penn-Olin Co.*, 378 U.S. 158, 175,

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denied, 369 U.S. 886, Cf. *Ramapo Bank* v. *Camp*, 425 F. 2d 333 (C.A. 3), certiorari denied, 400 U.S. 828. Second, so long as the sponsored bank is given time to establish itself in the local banking structure, its subsequent acquisition is consistent with the state policy, which permits new entry only by acquisition of established banks or branches. Cf. *First Nat. Bank* v. *Walker Bank*, 385 U.S. 252.

[8] The defendants stressed the unsatisfactory experience of the state's third largest banking organization, the Pacific National Bank of Washington, whose predecessor had entered Spokane by a small foothold acquisition. Some of these difficulties were shown by government witnesses to be attributable to inherited mismanagement and lack of close home office attention (Tr. 511–515). Another difficulty was that Pacific had lacked sufficient branches within a 100-mile radius of Spokane to provide a deposit base which would support a more viable operation there (Tr. 1133–1156). In contract, NBC presently has 15 branch offices within that radius (Tr. 945), with total deposits of $103 million (GX A–23), and already had $4.4 million in total deposits from, and $10.2 million in loans to Spokane customers (P.T.O. IV).

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after a full review of objective evidence showing the capability and incentive of joint venturers to enter a market independently, this Court held: "Unless we are going to require subjective evidence, this array of probability certainly reaches the prima facie stage. As we have indicated, to require more would be to read the statutory requirement of reasonable probability into a requirement of certainty. This we will not do." See, also, *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 580–581; *United States* v. *Falstaff Brewing Corp.*, No. 71–873, decided February 28, 1973, concurring opinion of Mr. Justice Marshall.

The reason is manifest. The proper question before the court in potential competition cases should not be whether management considered independent entry to be preferable to entry by acquisition, but whether independent entry is preferable to no entry at all for a firm with the defendant's capabilities and incentives. Entry by purchasing a large share of the market is always preferable to the hard competition required for successful entry *de novo,* or by a small "foothold" acquisition.[9] Moreover, if subjective evidence were de-

[9] A foothold entry was permissible under Washington law and was possible here. There were two state-chartered banks in the Seattle area which are attractive possibilities—the Farmers and Merchants Bank, described in footnote 10, *infra;* and American Commercial Bank, a five-branch, downtown bank with $20 million in deposits and about three percent of the market, which will be eligible for acquisition in 1975 (P.T.O. VIII, Exhs. E & F, pt. X). Moreover, American Commercial has only three fewer branches than Washington Trust, thus giving its new owner a solid base in the area (Tr. 506). NBC in fact had been negotiating to buy Farmers and Merchants, prior to acquiring Washington Trust, but claimed the price was too high (GX G-3).

terminative, effective enforcement of Section 7 would be seriously jeopardized, since the test of potential competition would then depend upon the trial court's evaluation of the sincerity of an acquiring firm's statements that independent entry is not a feasible alternative. Such a standard would make the antitrust consequences of an acquisition completely unpredictable to both business and government.

In the instant case, NBC had both the capability and the interest to make it a potential entrant. It had the resources (Tr. 98–100). Its interest in entering the Spokane market, the third largest market in the state, was longstanding and conceded (P.T.O. IV). The experts on both sides agreed that Spokane is growing (Tr. 441–442), although the court found its growth would be only slow to moderate (App. A, *infra*, p. 8). While it may not be a boom town, it is the trade center of Eastern Washington and the "Inland Empire," and there is substantial evidence that NBC had made active attempts to enter it.[10]

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[10] For example, before it acquired the Washington Trust Bank, NBC negotiated to acquire the much smaller Farmers and Merchants Bank—a two-branch, suburban bank with $13 million in deposits and about 2.5 percent of the market (GX G–2 to G–10). NBC considered the Spokane area a good center for the region's correspondent banking business (GX D–3); as a regional headquarters for its Eastern Washington branches (GX F–21); as a community to which many former NBC customers had moved (GX D–4); and as a market which would buy NBC's international banking know-how (GX D–5). The Chairman of NBC's holding company said that he had confidence in Spokane's future potential (Tr. 744, 943–944), and the acquired bank's 1971 Annual Report referred to Spokane's general business activity as "nothing less than very good" (GX D–1).

The record does not support the district court's conclusion that the Comptroller would not grant a charter for a new national bank in the Spokane area in the reasonably forseeable future (App. A, *infra*, p. 8). The district court relied heavily upon testimony by the Regional Administrator that he would not recommend approval of the acquisition of a smaller bank. But since he was testifying in support of a merger his superior had already approved, and since he can only state what he would recommend, not what the Comptroller would decide, such evidence is not convincing.[11] Indeed, if the market is undergoing reasonable growth and the existing banks are profitable, as was the case in Spokane (GX A–65, 66), it must be assumed that the regulatory decision will turn on the national policy in favor of market extensions by internal expansion, which is incorporated into the Bank Merger Act to the extent that it reiterates Section 7 (12 U.S.C. 1828(c)(5)(B)). Only if new entry might threaten the stability of existing banks could the Comptroller properly refuse new competition under the Act. Yet the defendants' experts and the Regional Administrator of National Banks conceded that new

[11] In addition, there is documentary evidence that early in the administrative proceedings the Comptroller favored the merger. Before the application was filed (and before receiving required competitive reports from the other banking agencies as well as the Department of Justice), he indicated to NBC that he would approve the merger, and that he would assist NBC in preparing the merger application and in defending the merger should the Department of Justice bring suit under the antitrust laws, requiring in return, however, a commitment by NBC not to abandon the merger if such a suit was brought (GX F–1, 2, 3, 10, 11 and 19).

entry would not threaten the soundness of any Spokane bank (Tr. 380–381, 1014–1015).

b. The district court also ignored objective evidence which established that NBC was perceived by other banks in Spokane as a potential competitor and as such exerted a "beneficial influence on competitive conditions in that market." (*United States* v. *Falstaff Brewing Corp., supra,* slip op., p. 7). Washington's former Supervisor of Banking testified that bankers fear entry by well financed outsiders and therefore seek to prevent it by claiming that they are adequately serving their area (Tr. 502–506). Here, NBC made its interest in entering Spokane known for many years (GX F–21, 23–26, 28–29, 31), and documentary evidence from NBC's files showed NBC's influence on the banks in Spokane and their awareness of its presence in the wings. This influence is most dramatically shown by a 1961 document indicating that local banks were contemplating more vigorous competition because NBC was "closing in around the Spokane area" (GX B–4).

c. The Spokane banking market, as noted, is highly concentrated; the three largest banks had 92 percent of the deposits. The district court, however, concluded that the market is nevertheless "highly competitive" (App. A, *infra,* p. 11). Its conclusion apparently rested primarily upon the opinions of the defendants' experts, which in turn were based upon conversations with bankers and an analysis of competition in banking involving comparisons of the ratios of population to banks and banking offices in various cities (see *e.g.,* Tr. 1034–1036).

This Court has recognized, however, that "market share and market concentration figures" (*United States* v. *Philadelphia National Bank,* 374 U.S. 321, 366) are the appropriate basis for determining whether a market is competitive, and that "[c]ompetition is likely to be greatest when there are many sellers, none of which has any significant market share" (*id.,* p. 363). Much economic theory predicts that highly concentrated markets are likely to be non-competitive; the record in this case confirms that prediction.

It shows that the highly concentrated Spokane market was marked by interdependent behavior in an atmosphere of friendly cooperation rather than vigorous price and service competition (Tr. 72–82, 86–95). Contrary to the district court's finding, this evidence was not "mere theoretical speculation" (App. A, *infra,* p. 11), but shows specific instances of cooperation between competitors in such matters as rates and service charges (GX B–1; Dep.R. Buck, pp. 53–58), offers to cooperate with NBC if it entered Spokane by acquiring a large bank there, the willingness of NBC to forego entry into a market near Spokane if a Spokane bank was interested in a particular acquisition (GX F–31), and other instances of "friendly" relationships (see, *e.g.,* GX B–2,3; F–26).

d. The effect of the elimination of NBC as a potential entrant in the Spokane market may have been subtsantially to lessen competition. The Spokane banking market, as we have shown, is highly concentrated. The possibility of entry by strong firms on the periphery of the market held out the greatest likelihood of ameliorating the market's anticompetitive character.

Such a potential competitor serves to influence the conduct of those firms already inside the market and is a possible source of further deconcentration through *de novo* or "foothold entry."

Here, NBC's significance as a potential competitor was demonstrated by expert testimony that it was one of only two institutions capable of entering Spokane *de novo* or by foothold acquisition (Tr. 98–100). The other, Peoples National Bank of Washington, the state's fourth largest bank, is one-third the size of NBC, making the latter the most significant potential entrant, and the most effective source for deconcentration. NBC was interested in entering the market and was perceived by those in the market as a potential entrant. By entering through the acquisition of one of the largest banking institutions in Spokane rather than *de novo* or through a foothold acquisition, it merely assumed the position of Washington Trust without increasing competitive pressures, and eliminated itself permanently as a potential competitor.

e. The district court's finding that the merger does not violate Section 7 because it would enhance rather than lessen competition is legally unsound and factually incorrect. The court's theory was that the merger would enable Washington Trust to provide additional services to the Spokane market that it does not now furnish but which are furnished by other banks there. Claims that a merger will increase the ability of the acquired bank to compete with other large institutions cannot justify a merger that otherwise would violate the standards of Section 7. *United States* v. *Phillipsburg National Bank,* 399 U.S. 350, 367; *United*

States v. *Philadelphia National Bank, supra,* 374 U.S. at 371. Moreover, since commercial banking is the relevant product market in this case, a merger which has the proscribed effect in that market cannot be justified by the claim that it helps competition in certain submarkets. These contentions would be relevant only if the merger were challenged because of its effect in those submarkets. Those factors are pertinent in determining whether the community "convenience and needs" clearly outweigh the anticompetitive effects of the merger, but not in determining its anticompetitive effect.

In any event, the few services Washington Trust did not offer were not of great competitive significance, since they are used by only a small percentage of the commercial bank customers in the Spokane market. These services include international transactions, commercial loans of more than $1.2 million (which is Washington Trust's loan limit), student loans and mining loans. These services necessarily were not important to the great bulk of bank customers in the area, and it is the effect upon the entire market area which determines the validity of the merger. See *United States* v. *Phillipsburg National Bank, supra,* 399 U.S. at 369–372.

f. This appeal also presents the substantial question whether the acquisition has the effects proscribed by Section 7 because of its anticompetitive impact in Eastern Washington and the State as a whole. Those effects stem from the elimination of Washington Trust as a potential competitor in those broader markets in relation to the leading statewide banks. Since banks

cannot operate outside the State boundaries, such potential competition by middle-sized banks may be the only likely source of stemming state and regional trends toward concentration in banking, and of ultimately reducing concentration in those broader areas.

2. The district court's erroneous conclusion that the merger would not have the anticompetitive effect proscribed by Section 7 necessarily undermines its finding that any anticompetitive effect would be clearly outweighed by the probable effect of the merger in meeting the "convenience and needs" of the Spokane area. The Bank Merger Act requires the district court to make a dual inquiry "to determine, first, whether the merger offended the antitrust laws and, second, if it did, whether the banks had established that the merger was nonetheless justified by 'the convenience and needs of the community to be served'" (*United States v. Third National Bank in Nashville,* 390 U.S. 171, 178). "To weigh adequately one of these factors against the other requires a proper conclusion as to each" (*id.* at 183). Since the district court "erred in assessing competitive impact," the case must be remanded "so that the District Court can perform again the balancing process mandated by the Act" (*id.* at 183–184, footnote omitted).

We add only that the district court's findings sustaining the "convenience and needs" defense rest primarily upon the additional services that the merger will enable Washington Trust to perform. As we have shown (*supra,* p. 22), those services are not sufficiently important to justify the anticompetitive consequences the merger would produce. Moreover, there

are ample alternative sources in Spokane for the few specialized services Washington Trust does not now supply (see, *e.g.*, Tr. 494; Interr. Nos. 10, 117).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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JUNE 1973.

APPENDIX A

In the United States District Court for the Western District of Washington

(Civil No. 237–71C2)

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARINE BANCORPORATION, THE NATIONAL BANK OF COMMERCE OF SEATTLE, AND WASHINGTON TRUST BANK, DEFENDANTS

and

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, INTERVENOR

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having come on duly and regularly for trial on January 8, 1973, before the undersigned Judge of the above-entitled court, Honorable William N. Goodwin, United States District Judge, Presiding, each of the parties to this action being represented by their respective attorneys of record, a Pretrial Order approved by all parties having been entered herein, written briefs having been submitted to the court by all parties, evidence oral and documentary having been introduced, each party having rested, oral arguments made, the issues herein having been submitted to the court for determination, and the court having announced its decision, now makes the following

FINDINGS OF FACT

1. The National Bank of Commerce of Seattle (hereinafter referred to as NBC), founded in 1889, is a national banking association. It has its principal place of business in the City of Seattle, Washington, transacts business and is found within the Western District of Washington.

2. Washington Trust Bank (hereinafter referred to as WTB), founded in 1902, is a banking corporation organized under the banking laws of the State of Washington, and maintains its principal place of business in the City of Spokane, Washington.

3. Marine Bancorporation is a corporation organized and existing under the laws of the State of Washington. It has its principal place of business in the City of Seattle, Washington, transacts business and is found within the Western District of Washington.

4. Marine Bancorporation is a registered bank holding company organized under the laws of Washington in 1927. It owns all of the capital stock of NBC, exclusive of directors qualifying shares.

5. NBC and WTB are each engaged in interstate commerce.

6. By an Agreement of Merger dated February 4, 1971, NBC and WTB agreed that WTB would be merged into NBC, and that thereafter NBC, as the surviving bank, would operate all banking offices of WTB as branches of NBC.

7. On March 9, 1971, NBC and WTB applied to the Comptroller of the Currency of the United States for permission to consummate the merger under the charter and with the title of NBC. A hearing on this application called by the Comptroller was held in Portland, Oregon on July 27, 1971. By his Decision dated and promulgated September 24, 1971 (a copy

of which is attached to the Pretrial Order as Exhibit A thereto), the Comptroller granted his permission to said merger.

8. Consumption of said merger was automatically enjoined under the provisions of the Bank Merger Act of 1966 (12 U.S.C. § 1828(c)(7)) by the institution of this action on October 22, 1971.

9. On December 4, 1971, the Comptroller exercised his statutory right under the Bank Merger Act to intervene as party to this action in support of his approval of the merger.

10. NBC operates 107 branch offices in the State of Washington, of which at least one office is located in each of 29 counties of the 39 counties in the state. However, of the four largest metropolitan areas in the state, i.e., the Seattle metropolitan area (the largest), the Tacoma metropolitan area (the second largest), the Spokane metropolitan area (the third largest), and the Everett metropolitan area (the fourth largest), NBC operates offices only in the Seattle metropolitan area, and does not operate offices in the other three metropolitan areas. Also, of the 154 cities in the State of Washington having a population of 1,000 or more, NBC has offices in only 54 such cities.

11. The business of commercial banking (and the cluster of products and services denoted thereby) is the relevant product market within which the competitive effect of the merger is to be judged.

12. Commercial banking in the State of Washington is inherently local in character. As in most service industries, convenience of location is essential to effective competition in commercial banking in the State of Washington. In this state, as well as elsewhere in the United States, generally, individuals and corporations typically confer the bulk of their patronage on banks in their local community; they find it imprac-

tical to conduct their banking business at a distance. The factor of inconvenience localizes banking competition in Washington State as effectively as high transportation costs in other industries.

13. The Spokane metropolitan area, consisting of the City of Spokane and the populated areas immediately adjacent thereto, including the area extending easterly through the suburb of Opportunity toward the Idaho border, as more particularly delineated and described in Exhibit I to the Pretrial Order herein, is the area of effective competition of commercial banks located in the City of Spokane and its environs, and constitutes the commercial banking market which is the relevant geographic market within which the competitive effects of the merger are to be judged.

14. Of the 90 state and national banks in Washington State, there are several national banks such as NBC which have numerous branches throughout the state, but each of these banks has no presence in a number of important local banking markets. The banking business of the remainder of these 90 banks is each confined to from one to several local banking markets, comprising, at the most, a small portion of the total number of local markets in the state. In view of the inherently local character of commercial banking in the state, and the fragmented character of the presence of even the largest banks in the various regions of the state, neither the state as a whole, nor any of the larger regions thereof, such as eastern Washington, constitutes a commercial banking market or a relevant geographic market within which the competitive effects of a transaction in the line of commerce of commercial banking may be judged.

15. NBC is a full service bank with assets in excess of $1,800 million, deposits in excess of $1,500 million, and a loan limit of $7.5 million, and in the event the

merger is consummated, will be capable of providing commercial bank customers in the Spokane metropolitan area with a complete alternative in all phases of full service commercial banking to those offered by the present market leaders, Seattle-First National Bank and Old National Bank of Washington.

16. WTB is a limited service bank with resources of $112 million, deposits of $96 million, and a loan limit of $1.25 million. Although WTB has seven banking offices in the City of Spokane and one in Opportunity, a suburb of Spokane, its activities are very limited in the areas of agricultural loans, residential and commercial mortgage loans, mining loans and inventory and accounts receivable financing. Its trust department and investment advisory services are substantially limited. It provides no services or facilities in the area of international banking. It does not participate in the local municipal bond market. Its credit card service may have to be discontinued, due to inadequate yield. It has not been able to provide the full needs of some of its customers and potential customers, due to its loan limit, and this problem seems to be growing more difficult.

17. NBC has a long history in the State of Washington as a vigorous competitor in the areas where it has established banking offices, and no credible evidence to the contrary has been presented in this proceeding. Based on its past record in this respect, it is reasonably probable that NBC will, if this merger is consummated, compete vigorously in the Spokane metropolitan market area in all phases of full service commercial banking, and due to its superior resources and capability, and the additional areas of loans and services which it will offer, the consummation of the merger will have the direct and immediate

effect of substantially increasing competition in commercial banking in the Spokane metropolitan area.

18. In view of the fact that there is no significant existing competition between NBC and WTB (Pretrial Order—Agreed Issues, paragraph IV), and the fact that it is reasonably probable that the consummation of the merger will have the effect of increasing competition in commercial banking in the Spokane metropolitan area, the court finds that the consummation of the merger will have no inherent anticompetitive effect, and Plaintiff has failed to establish any reasonable probability that any such anticompetitive effect will result from the consummation of the merger. On the contrary, the testimony of Dr. Haywood and Dr. Baxter has affirmatively established, and the court finds as a fact, that there is no reasonable probability that any anticompetitive effects will result from the consummation of the merger, or that the effect of the merger may be substantially to lessen competition in commercial banking in the Spokane metropolitan area, or in any other commercial banking market.

19. In support of Finding No. 18 above, the court finds that the Plaintiff has failed to establish that in the event the merger with WTB is not consummated, there is a reasonable probability that NBC will enter the Spokane metropolitan area market in the reasonably foreseeable future, or that there is any feasible alternate method by which NBC could do so. On the contrary, the evidence advanced by Defendant and Intervenor has affirmatively established, and the court finds as a fact, that the legal and economic barriers to any other method of entry by NBC into the Spokane metropolitan area are such that in the event the merger is not consummated, there is no reasonable probability that NBC will enter said area in the reason-

ably foreseeable future. Said legal and economic barriers include the following:

(a) Under applicable law governing branching by commercial banks in Washington, NBC cannot establish a branch *de novo* in Spokane or Spokane County. The only legal method by which it can establish a branch in Spokane is by acquiring an existing bank (or a branch of any such bank) operating in Spokane. Plaintiff has failed to establish that there is any existing bank or branch in the Spokane metropolitan area, other than WTB, which is available for acquisition by NBC or that there is any reasonable probability that any such bank or branch will be available for acquisition by NBC on any reasonably acceptable basis at any time in the foreseeable future, or at all. On the contrary, the evidence advanced at the trial has affirmatively established, and the court finds as a fact that there is no bank or branch in the Spokane metropolitan area other than WTB which NBC could acquire at the present time, and there is no reasonable probability that any such bank or branch will be available for acquisition by NBC on any reasonably acceptable basis at any time in the reasonably foreseeable future.

(b) Any method of entry into Spokane by NBC which would be limited to a foothold or the substantial equivalent of a *de novo* entry would, even if it could be legally accomplished, not be economically feasible for NBC. The following facts and circumstances established by the evidence support this finding:

A. It would not be compatible with prudent business practice in commercial banking for a major full service bank such as NBC to enter the Spokane metropolitan area, or any similar metropolitan area, on a limited service basis comparable to that of a newly-organized independent unit bank. To do so would be more of a detriment than a benefit to NBC,

and its past and present chief executive officers have testified that NBC would not consider entry in that manner, even if it could be legally accomplished.

B. Due to the extensive development of branch banking in metropolitan areas in Washington such as the Spokane metropolitan area, branch offices are essential to effective competition in such metropolitan areas. As a Seattle bank, NBC could not establish additional branches in Spokane.

C. In the Spokane metropolitan area, and in Washington State as a whole, new business is acquired by commercial banks largely as a result of the growth of the communities which they serve. Customer loyalty to his bank connection is very strong in this state, and, consequently, competition for new business is largely in the area of prospective new customers resulting from growth of the banking market, rather than competition for established customers of the competing banks. In this connection, growth of the Spokane metropolitan area has been slow during the past ten years, and it is probable that it will continue to be slow to moderate in the reasonably foreseeable future. Consequently, the prospects for growth, or even survival, of a bank or banking office starting from scratch or from a minimal foothold in the Spokane metropolitan area is negative. In this connection, the court gives great weight to the testimony of H. Joe Selby, Regional Administrator of National Banks for the 13th Region, and finds that it is not reasonably probable that a charter for a new national bank in Spokane will be granted within the reasonably foreseeable future.

D. A small office, such as would be compatible with the limited amount of deposits which could be expected for the first five to ten years, could not house or support the full services of a bank such as NBC

in a metropolitan area such as Spokane. Adequate facilities and staff for this purpose could not be justified on any basis without an adequate deposit base. Actual experience of foothold entry into Spokane by The Pacific National Bank of Washington, and of foothold entry by Old National Bank of Washington into Seattle by foothold entry has been such as to discourage such projects, even where a small going bank was available. Starting from scratch would be even less likely to produce satisfactory results in a reasonable time.

E. Profitable correspondent relationships enjoyed by NBC in Spokane, particularly with WTB, would be jeopardized and probably lost if NBC were to enter by other means, thus offsetting any hoped-for gains.

F. The commitment of cash resources necessary to establish the facilities and staff required to provide full service commercial banking to Spokane would be entirely out of line with prospective earnings and benefits which could reasonably be expected to result.

G. Even if, despite the above considerations, NBC should decide to commit the necessary resources to enter a new metropolitan area in such manner, other alternatives such as Tacoma and Everett would have to be considered, and it is reasonably probable that Tacoma, rather than Spokane, would be preferable to NBC.

20. In further support of Finding No. 18, the Court finds that if, despite the considerations set forth in Finding No. 19 above, NBC should enter the Spokane metropolitan area by foothold acquisition or by some indirect means substantially equivalent to a *de novo* entry, such limited entry and restricted presence in the market area by NBC would have no significant competitive impact on commercial banking in the

Spokane metropolitan area. In this connection the Court finds that the foothold entry made by National Bank of Washington (now Pacific National Bank of Washington) into the Spokane metropolitan area in 1965 has not had any significant competitive effect due to the relatively small amount and share of deposits and other banking business which it has been able to obtain since its entry, and the Court finds no reasonable probability that NBC would fare substantially better if limited to a foothold entry or less. The Court finds therefore that the procompetitive effect of any such entry by NBC into the Spokane metropolitan area in such manner would not be significant, and is far outweighed by the substantial, direct and immediate procompetitive effect which the Court has found to be reasonably probable as a result of the consummation of the merger.

21. In further support of Finding No. 18, the Court finds that the threat of entry by NBC into the Spokane market by any means other than the consummation of the merger, to the extent any such threat exists, does not have any significant effect on the competitive practices of commercial banks in that market nor any significant effect on the level of competition therein.

22. On the basis of the testimony of Dr. Haywood and Dr. Baxter and other evidence advanced at the trial, the Court finds that the structural factors such as the relative shares of IPC deposits relied upon by Plaintiff do not establish that the Spokane market in commercial banking is not a competitive market. The Court finds that the *other* structural factors relied on by Drs. Haywood and Baxter, such as the number of banks and the number of banking offices in the market area, together with the actual performance of the market as observed by Dr. Baxter, establish as

a fact that the Spokane commercial banking market is a highly competitive market, and does not suffer from parallel or other anticompetitive practices attributable to undue market power. The Court rejects the testimony of Dr. Smith in this regard as based on mere theoretical speculation not in accord with realities of the commercial banking business in Spokane.

23. Plaintiff has failed to establish or produce any evidence whatsoever that there is any reasonable probability that WTB will expand into other banking markets in eastern Washington or that WTB has the incentive or capability to do so. Plaintiff has also failed to establish or produce any evidence whatsoever that there is any reasonable probability that WTB will combine with other middle-sized or smaller banks for any purpose. On the other hand, Defendants have presented clear and convincing evidence to the effect that WTB has neither the capability, resources or incentive to embark on any such schemes of expansion or consolidation, and the Court finds that there is no reasonable probability that WTB will take any such action in the reasonably foreseeable future.

23. There is no reasonable probability that Old National Bank of Washington will be entrenched as a dominant bank in the Spokane metropolitan area or in Spokane County as a result of the elimination of WTB as a competitor for branch bank sites in those areas.

24. Mergers and consolidations between other banks in Washington, either state or national, cannot be consummated without the approval of the regulatory authorities which are charged with the duty of examining all aspects thereof to determine whether or not such merger or consolidation is in the public interest. If it appears that any such merger or consolidation is

not in the public interest by reason of the adverse factors suggested by Plaintiff herein, the court is satisfied that the regulatory authorities will perform their duty and withhold approval, notwithstanding whether or not the instant merger between NBC and WTB is consummated. The court finds, therefore, that there is no reasonable probability that the consummation of this merger will foster further mergers which are, for any reason, not in the public interest.

25. Assuming, arguendo, that, contrary to the foregoing Findings, the merger would have some or all of the anticompetitive effects alleged by Plaintiff, said effects are clearly outweighed in the public interest by the probable procompetitive effects of the transaction in meeting the convenience and needs of the community to be served.

(a) This merger is procompetitive in that it will put NBC into the Spokane market to replace Washington Trust which is presently limited by its size in its ability to compete with the state's largest financial institutions including Seattle-First National Bank.

A. Washington Trust Bank is under severe limitations because of its lack of resources, and is unable to compete substantially in areas requiring specialization and expertise that the bank has not been able to get into because of its lack of size.

B. After Washington Trust is successful in nurturing small customers into larger and successful ones, they then exceed the ability of Washington Trust to help and it cannot service their needs.

C. This merger will make the Spokane market even more competitive, as it will replace a bank with limited competitive ability vis-a-vis these larger banks in Spokane, with the second largest bank in the state; one with more capacity to provide loans, various kinds

of specialized services and more resources to sustain a competitive battle than Washington Trust now has.

D. Washington Trust is presently at a competitive disadvantage being unable to offer all banking services which are demanded in Spokane. As a result of this merger, it will be able to more effectively compete in that market.

E. When the issue before him is an application to merge, the Regional Administrator of the Office of the Comptroller of Currency (which regulates and supervises national banks and passes upon mergers under authority of the Bank Merger Act of 1966 (12 U.S.C. § 1828(c)(5), et seq.)) considers the convenience and needs of the public involved including the effect of the acquisition upon competition, among other factors. In considering the merger of NBC and Washington Trust Bank, he concluded that the merger would be procompetitive in that it would allow NBC to enter the Spokane market on an adequate basis with which to compete with Seattle-First and Old National Bank.

(b) This merger is procompetitive because NBC's higher lending limit will give Washington Trust's customers and everyone else another source of large loans.

A. Although Washington Trust Bank's legal lending limit is about $1.25 million, as a practical matter the bank's policy is not to go over $1 million; NBC's lending limit is about $7.5 million.

B. When the Spokane based R. A. Hanson Company exceeds Old National's lending limit, it will be forced to deal with the "one store left in town"—Seattle First National Bank. The entry of the National Bank of Commerce into Spokane by this merger will give that company a second large bank to which it can look for large amounts of financing and in that respect will be procompetitive.

C. The Degerstrom Construction Company, headquartered in Spokane, builds large projects for the public, including highways, airports and dams. He secures jobs on these projects through competitive bidding. Having an alternative source for the large amounts of money Mr. Degerstrom needs in Spokane would have a procompetitive effect on interest rates. This in turn, would allow the Degerstrom Company to be more competitive in bidding on public projects.

D. The Bennett Lumber Company is one of five or six in the area that looks to Washington Trust for financing, being roughly of medium size (about $10 million gross). If adequate financing for the lumber business is not available, its ability to compete is impaired. Washington Trust is particularly important in financing the lumber industry. In the past, other banks have not been as interested in such financing, and it would be beneficial to the entire industry to have NBC with more lending power. Bennett Lumber uses financing to carry its inventory and accounts receivable. Also, it must finance repairs and expansions, including things like pollution control devices. It sometimes needs about $1 million in inventory financing alone. When Bennett Lumber sought to expand, it reached the lending limit of Washington Trust. Participations were sought unsuccessfully, as well as a loan from an insurance company. Ultimately, the company had to resort to the Federal Land Bank. This entailed negotiations with the Internal Revenue Service in Washington, D.C., hiring attorneys and accountants, splitting up his corporation, paying a higher interest rate, and waiting almost a year before he got the money. It would have been very beneficial if Washington Trust had been large enough to be capable of helping Bennett Lumber. The need to search for another source for this financing caused Bennett to curtail its operations.

(c) This merger is procompetitive because it will make NBC's international banking services available in Spokane as a needed alternative source of such services.

A. NBC, if it comes in through this merger, will offer in Spokane the services of the best international department in the region, with branches in London, Paris, Tokyo, Hong Kong and Singapore. Positions are maintained in foreign currencies which enable NBC to trade and give immediate international exchange quotations.

B. There are several companies in Spokane which handle exports of peas and lentils and which can use more competition in international banking services. They include Merchandisers Unlimited, Spokane Seed Company, McDonnel Seed Company, and Inland Empire Pea Growers.

C. Old National Bank of Washington in Spokane does not have expertise in the field of international banking.

D. American Sign and Indicator Corporation, ABC Machine Tools, Inc., and several other capital goods producers in Spokane might all develop more foreign sales if a local bank could provide know-how and follow up in specialized export programs.

E. International banking is becoming more and more needed in Spokane, and WTB cannot presently compete in that area.

F. The Vaughn-Jacklin Seed Company raises and sells turf grass seeds produced in the Spokane vicinity. Each year, the Spokane area accounts for twenty to twenty-five million pounds of seed, principally turf grass. This company seeks to expand its export operations in foreign markets. Presently, in a small way, the company exports through one of its competitors, because its bank, Washington Trust, lacks the neces-

sary expertise in international trade. A bank with a strong international department would be of benefit and is a must if the company is to move strongly into international markets.

G. Hollister-Stier Laboratories manufactures biological products, primarily allergens, from its headquarters operation in Spokane and elsewhere. It sells these products throughout the United States and overseas in conjunction with foreign subsidiaries established by it. When one of these subsidiaries was established in France, the company had to go through a New York Bank. There is a need for services of the kind to be available through a local bank in Spokane.

H. The R. A. Hanson Company, located in Spokane, manufactures specialized construction machinery used primarily in building irrigation canals, and sold throughout the world. This company presently gets its international banking services through a correspondent of Old National Bank of Washington and has experienced difficulty in transacting business in this manner. The entry of NBC into Spokane by this merger will provide an alternative source of international banking services and would be procompetitive. It will benefit this company directly if it utilizes such services, and indirectly in any event, as Old National will have to compete through better services because NBC is there.

(d) This merger is procompetitive because it will enable Washington Trust to compete in mining loans, which, because of its size, Washington Trust has never been able to do.

(e) This merger is procompetitive because it will provide a needed alternative source of bank quality mortgage financing in Spokane. The present resources of WTB are not sufficient to provide for any volume of these loans. There is a need in Spokane for addi-

tional mortgage financing in the residential field. NBC makes residential mortgage loans including FHA and VA loans in volume. Current interest rates on conventional loans are 6¾% to 7% on bank quality conventional loans. These loans would be made available in Spokane in accordance with its needs if this merger goes through. NBC will provide in Spokane interim construction financing in the field of mortgage lending. This requires a great deal of skill and judgment and expertise which NBC has available. Coast Mortgage, a subsidiary of Marine Bancorporation generates a quality of mortgage quite different from those offered by the National Bank of Commerce. While there are other sources for financing residential mortgages in Spokane, there is only one commercial bank which offers mortgage financing in volume. This is Seattle-First and they began offering conventional mortgage loans six or eight months ago. It would be highly desirable for NBC to enter Spokane and offer conventional mortgages at a 7% interest rate.

(f) This merger is procompetitive because it will provide a needed alternative source of financing agricultural needs.

A. The Federal Intermediate Credit Bank of Spokane supplies wholesale money for some 30 Production Credit Associations (PCA's) throughout four Northwest states and Alaska. PCA's are federally chartered corporations, owned and controlled by farmers and ranchers supplying production financing and capital requirements for terms up to seven years. At present there are some 15,772 active borrower members in this bank's area. A PCA might commit itself to supply operating funds for a 12-month period, or capital items for longer terms. The farmer can draw against this commitment as the funds are needed during the period of the loan. The Intermediate Credit Bank in

turn "rediscounts" the PCA loan guaranteeing the PCA that it will supply these funds over the period needed. When this commitment is made, the funds are not necessarily available at the Federal Intermediate Credit Bank and it has the burden to obtain and supply the money as required. Ninety-three percent of these funds come through the sale of debentures in the public market. The other seven percent comes from commercial bank borrowings. The FICB's needs for funds are erratic. It is subject to drafts "any minute of the day" and the bank never knows what the requirements will be in terms of receipts coming in and disbursements to be made. It is vital to have a larger amount of credit available at this time. Within the next few years FICB's requirements will double and the bank is seriously concerned over where these funds are to come from. In November 1972, the Federal Intermediate Credit Bank in Spokane needed to borrow about $27 million. At that time there was only one bank in Spokane, Seattle-First National Bank, providing the large scale line of credit needed by the Federal Intermediate Credit Bank, which at this time had obtained only an $8 million line of credit there. The Intermediate Credit Bank has already been able to use NBC's announced entry into Spokane through this merger in a competitive manner, bargaining with its only present Spokane source of bank funds (Seattle-First) for and obtaining an increase in its line of credit from $8 million to $12 million. NBC's entry into Spokane will provide a competitive source for the substantial funds needed by FICB.

B. A larger lending limit would help Washington Trust be more competitive in agricultural lending, something they are not now in a position to do.

C. NBC has the best agricultural lending department in the region. (11th largest in the United

States.) NBC will make agricultural lending services available in Spokane if the merger is permitted.

(g) This merger is procompetitive because it will bring to Spokane a needed alternative source of financing for local and municipal governmental needs.

A. NBC has a positive policy to bid on every issue offered by public bodies where the bank is located and has been very aggressive and successful in these bids. NBC at times can broaden the market for municipal issues through its salesmen who contract correspondent banks or individuals in the market for such securities. NBC will make available in Spokane its investment department which will assist and work closely with public treasurers, and provide a source for investment of these excess public funds.

B. NBC is the first bank located in the State of Washington to be designated fiscal agent. This entails the responsibility for payment of coupons and matured bonds of all political subdivisions of the state utilizing this service. Previously, New York City banks had handled this and were compensated by requiring the public body to deposit its funds in advance of the due date to the banks's advantage and reducing the local government's money. NBC does this without requiring lead time, thereby saving money for the municipalities.

C. Merton Howard is the Treasurer of Spokane County and has been such for 15 years. He advises the many subgovernmental districts in Spokane County on financing matters. These districts have needs for financing which do not attract lenders outside the area and so must be met by local financial institutions. In the areas where NBC has been present in the county it has helped local governmental bodies in meeting their financial problems. It should do the same for Spokane if NBC were to enter

through merger with Washington Trust. NBC's entry through this merger would give Spokane County an additional source for financing local subgovernmental units.

D. County funds are often invested under repurchase agreements which allow them to earn interest yet are very short term so that the money is readily available. Presently, only two banks in Spokane bid on the County's repurchase agreements. If NBC were in Spokane through this merger there would be an additional bidder on repurchase agreements. It has been the County Treasurer's personal experience that additional competition on these instruments raises interest rates paid to the direct benefit of taxpayers and the public.

(h) This merger is procompetitive because it will bring to Spokane a needed alternative source of the many and varied specialized lending and bank services in which only a bank of NBC's size can compete with institutions the size of Seattle-First.

A. NBC has a substantial trust operation with specialists in all areas of trust investment and research. It offers counseling and advice, nine or ten common trust funds for greater flexibility, and efficient handling of accounts. Most surpass in performance the leading composite stock market averages.

B. NBC has a great deal of expertise available and lending capacity in the installment lending field, term loans on plant and equipment, vehicle leasing, SBA loans (including ones in the agricultural field), student loans (even though not profitable) and lease financing. This expertise and lending capability will be made available in Spokane if this merger goes through.

C. NBC offers substantial computer services.

D. NBC makes economic opportunity loans to minority groups together with the counseling and personal attention helpful to the borrower. This type of financing will be made available if the merger goes through.

E. Washington Trust has never had the capital available to compete in the area of other specialized loans such as term capital loans or "turnkey" loans.

F. Even if Washington Trust could afford to go out and hire personnel with the expertise and specialized knowledge it takes, it does not have sufficient funds to really become a factor in these areas so that it would be extremely expensive to bring such experts into the bank.

G. Washington Trust's trust department is not really competitive in certain areas of trust services, including investment advisory services.

H. Gonzaga University in Spokane this year processed about 650 applications for the guaranteed loan program, and 50 to 60 percent of all Gonzaga students depend a great deal upon loans. Presently, there is only one reliable, dependable source of student loans in Spokane—Washington Mutual Savings Bank, and a second source or outlet for such loans is needed and would be very helpful. The students need these loans now, not ten years from now.

26. There are no reasonable alternative means of providing the procompetitive benefits of this merger.

(a) Loan participations are not a satisfactory way for a bank to obtain additional funds for its customers.

A. Servicing its customers by using other banks to place overlines has been unsatisfactory. It requires explanation and justification of the credit worthiness of the customer to another bank located hundreds of

miles away. Furthermore, this type of credit is not always available.

B. See Findings 24(b)D showing difficulties of Bennett Lumber Company.

(b) Entry by any of plaintiff's suggested alternative means is either unlawful, unobtainable, unattractive or impractical, and in any event would not provide the immediate procompetitive benefits of the instant merger.

See Findings 19 and 20.

27. The procompetitive aspects of the merger will benefit the entire community.

(a) The entry of the National Bank of Commerce into Spokane through this merger will benefit the convenience and needs of the community, and not only the people who have particular needs for certain sophisticated bank services. As Dr. Baxter testified, the economic system is a circle. If businesses can get better international banking services or larger loans, it follows that a direct result will be more investment and increased employment. The increase in competition goes across the range of all banking services which are offered to all banking customers, and all banking customers benefit from the general growth of the economy.

From the foregoing FINDINGS OF FACT, the court now makes the following

CONCLUSIONS OF LAW

1. The court has jurisdiction of the subject matter and of the parties to this action.

2. Plaintiff has failed to prove that the merger between NBC and WTB, if consummated, may substantially lessen competition in commercial banking in the Spokane metropolitan area or in any other section of the country.

3. Plaintiff has failed to prove that the said merger, if consummated, may substantially lessen competition in any line of commerce in any section of the country.

4. Consummation of the proposed merger of Washington Trust Bank into The National Bank of Commerce of Seattle does not violate Section 7 of the Clayton Act.

5. If, contrary to the foregoing findings, the said proposed merger did have some or all of the anticompetitive effects alleged by Plaintiff, Defendants and Intervenor have sustained the burden of establishing their affirmative defense under the Bank Merger Act of 1966, i.e. that said anticompetitive effects are clearly outweighed in the public interest by the probable effects of the merger in meeting the convenience and needs of the community to be served.

6. The statutory injunction presently in force should be dissolved.

7. Defendants and Intervenor are entitled to statutory costs.

Dated this 31st day of January, 1973.

WILLIAM N. GOODWIN,
United States District Judge.

Presented by:

R. A. MOEN,
One of the attorneys for the Defendants.

And by:

JON D. HARTMAN,
One of the attorneys for the Intervenor.

APPENDIX B

In the United States District Court for the Western District of Washington

(Civil No. 237–71C2)

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARINE BANCORPORATION, THE NATIONAL BANK OF COMMERCE OF SEATTLE, AND WASHINGTON TRUST BANK, DEFENDANTS

and

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, INTERVENOR

Judgment and Decree

This action having come on duly and regularly for trial on January 8, 1973, before the undersigned judge of the above-entitled court, Honorable William N. Goodwin, United States District Judge, Presiding, each of the parties to this action being represented by their respective attorneys of record, a Pretrial Order approved by all parties having been entered herein, written briefs having been submitted to the court by all parties, evidence oral and documentary having been introduced, each party having rested, oral arguments made, the issues herein having been submitted to the court for determination, the court having announced its decision and having entered herein its FINDINGS OF FACT AND CONCLUSIONS OF

LAW pursuant to Rule 52 FRCP, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. Consummation of the proposed merger of Washington Trust Bank into The National Bank of Commerce of Seattle does not violate Section 7 of the Clayton Act;

2. If, contrary to the foregoing finding, the said proposed merger did have some or all of the anticompetitive effects alleged by Plaintiff, Defendants and Intervenor have sustained the burden of establishing their affirmative defense under the Bank Merger Act of 1966, i.e. that said anticompetitive effects are clearly outweighed in the public interest by the probable effects of the merger in meeting the convenience and needs of the community to be served.

3. The prayer of Plaintiff in its Complaint for an order enjoining said merger and for other relief is denied in all particulars with prejudice;

4. The automatic injunction imposed by the filing of the instant action (12 USC 1828(c)(7)(A)) is hereby dissolved, effective thirty days after the entry of this JUDGMENT AND DECREE;

5. Judgment is entered in favor of the Defendants and Intervenor for costs hereafter to be taxed; and

6. This action is hereby dismissed, with prejudice.

DATED this 31st day of January, 1973.

WILLIAM N. GOODWIN,
United States District Judge.

APPENDIX C

In the United States District Court for the Western District of Washington

(Civil Action No. 237-71C2)

Order Denying Plaintiff's Motion for Additional Findings of Fact

United States of America, plaintiff

v.

Marine Bancorporation; the National Bank of Commerce of Seattle; and Washington Trust Bank, defendants

and

William B. Camp, Comptroller of the Currency, intervenor

Plaintiff's Motion for Additional Findings of Fact came on duly and regularly for hearing on February 22, 1973 before the undersigned judge of the above-entitled court in session at Las Vegas, Nevada, outside the above-entitled district but with the consent of all parties affected thereby, each of the parties hereto being represented by their respective attorneys of record; and the court having considered the motion and the memoranda submitted by the said attorneys in support of their respective positions, and having heard oral argument and separately considered each of the Additional Findings of Fact requested by plaintiff and being of the opinion that the said requested Addi-

tional Findings of Fact are either contrary to the Findings of Fact entered herein on January 31, 1973, or are immaterial, not pertinent, or unnecessary to the court's legal conclusions as reflected in the said Findings of Fact entered on January 31, 1973, now therefore it is hereby

Ordered that Plaintiff's Motion for Additional Findings of Fact and each thereof as set forth in plaintiff's said motion, be and the same is hereby denied.

Dated this 22 day of February, 1973.

WILLIAM N. GOODWIN,
United States District Judge.

Presented by:

R. A. MOEN,
One of the attorneys for the Defendants.

And by:

JON D. HARTMAN,
One of the attorneys for the Intervenor.

APPENDIX D

United States District Court Western District of Washington at Seattle

(CIVIL No. 237–71C2)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARINE BANCORPORATION; THE NATIONAL BANK OF COMMERCE OF SEATTLE; AND WASHINGTON TRUST BANK, DEFENDANTS

and

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, INTERVENOR

Notice Is Hereby Given that the United States of America, plaintiff herein, appeals to the Supreme Court of the United States from the judgment for defendants entered January 31, 1973, which was re-entered and became final upon the entry of the Order of February 22, 1973, denying plaintiff's timely motion for additional findings.

This appeal is taken under the Expediting Act, 15 U.S.C., Sec. 29.

Dated at Seattle, Washington, March 30, 1973.

R. J. TORRE,
Attorney for Plaintiff.
STAN PITKIN,
United States Attorney.
by ALBERT E. STEPHAN,
Assistant U.S. Attorney Of Counsel for Plaintiff.

CERTIFICATE OF SERVICE

I, Albert E. Stephan, Assistant U.S. Attorney, hereby certify that I have on this day served the foregoing Notice of Appeal to the Supreme Court of the United States on the attorneys of record for the defendants and for the intervenor by placing copies thereof in government franked envelopes, addressed as follows:

R. A. Moen, Esquire
Graham, McCord, Dunn, Moen, Johnston & Rosenquist
3900 Seattle-First National Bank Building
Seattle, Washington 98154

Jon D. Hartman, Esquire
Office of the Comptroller of the Currency
Treasury Department
15th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Daniel M. Gribbon, Esquire
Covington & Burling
888 16th Street, N.W.
Washington, D.C. 20220

and by depositing said envelopes in the United States mail at Seattle, Washington, for delivery as directed.

By CHARLES F. MANSFIELD,
ALBERT E. STEPHAN,
Assistant U.S. Attorney.

Dated: March 30, 1973.

The COURT. All right, I will take that matter up with you, Counsel.

During the course of the trial, you probably obviously noticed that I don't take any notes. The reason I don't take notes is that I can't listen to the witnesses and write at the same time. I attempt to evaluate the witness' testimony by not only hearing what he says but looking at him while he is saying it. There are a lot of things that you take into consideration aside from just what a man says. Sometimes it is more important to see him when he says it.

As far as my evaluation is concerned, I am more impressed and give more credence to the testimony of Dr. Baxter and Dr. Haywood than I do to Dr. Smith. Of course, that indicates to you how I am going to decide the case. Now I will give you my reasons for that.

Dr. Smith, and I don't discredit his testimony to the point that I just feel that he got up here and said something that he didn't believe, that isn't the point at all. But he started talking about this rivalry as contrasted to competition. I was concerned about that because that isn't something I run into every day. I know what a rivalry is as regards to athletic competition. Washington State University and the University of Washington, for example, are bitter rivals. I went through that, I know that, but that doesn't mean that they don't compete just because they are bitter rivals. They do compete, and if you saw the game in Spokane, you would realize they competed. Of course, it turned out to my satisfaction,

so I was really happy that they competed. Of course, there are people in the audience here that were really unhappy, I think, because of the competition. It depends on where you look.

But referring to his statement about rivalry, I was not quite sure just what he had to back that up with except the reference, I believe, to something that was said between two bankers at the cocktail party concerning their specifics concerning some interest rates, what have you. Then I asked Dr. Haywood about that, and he explained to me that term, as it relates to economic theory, meaning that rivalry is a term used when you don't have what you call pure, unadulterated competition, is the way I understood him to say. Then he started talking about rivalry as a theoretical term. I was impressed by Dr. Haywood's knowledge in the area. His conclusions regarding what constitutes a concentrated market and his explanation of why he didn't think the Spokane market was per se a concentrated market, I was impressed by the manner in which he testified, which I felt was not in any way hesitant. He was forthright and he didn't hesitate, he didn't meander or wander around. He gave direct answers, he didn't qualify.

I personally observed him and I observed Smith, and I gave more credence because of his manner, and he was more lucid, as far as I was concerned, in his explanations to me, and then that is a requirement that I understand what they are talking about.

As far as Baxter is concerned, I think the basis of his opinions were fairly well stated because of the statistical analysis that he made and the type of analysis that he made. As, for example, the number of people per banking office, that I felt had a basis for the opinion he expressed, and a number of other factors, population, the style of the city of Spokane

and its position as relates to the other cities in the nation of similar population, and the number of banks in the city and his analysis, and they all agreed on the slow growth aspect of the city of Spokane, which is very comparable to the problem that was raised in Twin Falls and the potential and the toehold acquisition. How are you going to grow if you go in on a toehold basis, and I recite that as it relates to desire for a bank to go into a market of that character on a toehold basis, what the future holds and the experience of the Pacific National Bank in the community.

You talk about all these new deposits that are going to be available in the future; in the future when? Those kinds of things, in my judgment, are the facts that I used in determining the credibility of the testimony of the experts who gave me the theory.

The wings effect, well, if you talk about wings effect, it is the Pacific National Bank's experience, if that is any indication of what the other bankers feel about wings effect, if they were to go in there on a branch basis, the national bank branch basis authorized by the Comptroller, I can't see any wings effect there nor do I see any particular wings effect on an acquisition basis of the bank in Rockport and the bank in Opportunity.

If you don't have a substantial office in the downtown area of Spokane in that market, I don't think that you are going to be competitive, period, regardless of whether you want to give any free checking accounts and all of the other matters and other ways that the banks could be competitive according to your contentions.

Another thing, consider in a regulated business, it is a little different ball of wax than supermarkets. Who cares whether supermarkets go broke from the

government standpoint? You don't regulate supermarkets as far as going broke is concerned or markets, period, or restaurants. When you start talking about banks, that's a different matter.

The Comptroller of the Currency, that is his primary interest in seeing that a bank that goes into a market doesn't fail nor does it cause the other banks to fail, put them on the ragged edge. That is in the public interest, sure, although the FDIC comes to the rescue and pays off the depositors. On the other hand, there are a lot of other emoluments, if you want to call it that, from a bank failure. So you have got a regulated industry.

You have got the Comptroller of the Currency allegedly, at least, acting in the public interest. On the other hand, you have the Department of Justice allegedly acting in the public interest. In my opinion no one has a monopoly on the public interest. I think that the Comptroller's office is as much interested in the public, the people, if you choose, as is the Justice Department. I see very little difference. They have different opinions, as is demonstrated by the number of cases where they barnstorm, and that's about what it is, what it amounts to, they are all over the country fighting each other at taxpayers' expense, incidentally.

So I just can't feel that the Comptroller's office and their expertise is to be—it's a question, but it takes a burden to establish that the Comptroller's decisions aren't in the public interest, in my judgment.

I don't think that the government has met the burden in this instance.

I will go right down this headnote, and I agree with headnote number 1 on page 261 of U.S. vs. Idaho, "In bank merger case, trial is de novo and function of trial court is to consider and determine a new and fresh all issues of fact and law," "Number 2, the gov-

ernment has the burden to show by preponderance of evidence that, in reasonable probability, the bank merger, which was approved by Comptroller of the Currency, would substantially lessen competition, and the banks"—and I don't read this exactly the way it is written, if there is an indication of an anti-competitive effect, then the bank, of course, has the—and the Comptroller has the burden of proving that the merger would provide clear and better bank services meeting needs and requirements of the community that clearly outweigh in public interest any anti-competitive effects that might result from the merger.

Well, I just don't see where there is going to be any anti-competitive effect here. I don't think the facts show it. I don't even think in theory it was shown in this instance. I think that Baxter and Haywood have established that this theory, these two banks, I find as a fact and you stipulated to this, were not competing with each other despite the fact that the N B of C did have branch offices outside the City of Spokane but not close enough to be in any way competitive with Washington Trust.

And I agree with this 3rd headnote that de novo trial, the District Court tries it as any other case, and you determine it upon the specific facts found from the evidence presented in that particular theory.

I explained, as a matter of fact, and I think it is agreed, that the growth of Spokane has been slow and will continue to be slow and moderate and that any new bank that goes in there on a toehold interest would not be a factor because it would be so long, if ever, that that bank would get a share of the new deposits that it just wouldn't be a factor.

Then there is another reason, the facts of life are that you just don't go out and pirate other people's customers when they are banking customers like you

do by putting an ad in a newspaper saying, "Hamburger on sale." The women go around and shop, most of them, I guess, and every time you put the words "For Sale" up, why, they flock in. Have you ever had the experience of going into a department store where they have what they call these tables with all the stuff on it, they fight each other to get at that stuff because of price. That isn't the banking business at all.

In the first place, a banker and his customer have a confidential relationship, and I think I stated it fairly clearly when I said a man once told me that the reason that he banked at the Bank of California was that they didn't have a local Board of Directors, he didn't have a lot of people talking about his business. I think that is quite true. Nobody wants anybody else to know what goes on in his business, how much money he needs, whether he is hard-pressed or anything of that sort. So you have a confidential relationship.

You really have a different situation when it comes to competing for customers, and I would go one step further, you are not going in the banking business to keep your customers unless you give what I call a good deal, that's an old street term. There is an adage, "No deal is a good deal unless it is good for both sides." How true. So it's got to be good for the customer as well as for the bank.

So when you start talking about competition in banks, it is true that some may be overzealous banks that want to make too much money, they might get together with some of their alleged competition, but that isn't this case.

There is another factor, this is a fact of life, you have a lot more people in a bank than the chief executive, and those people like to be promoted. They work there for years and years. How do they get promoted?

By doing a good job, hustling, trying to do a good job from a competitive standpoint to show their ability to earn what they think they are worth. That is not a matter in evidence here, but it is a fact of life that you have to draw on in making a determination of what competition is and how it occurs and in addition to theoretical points.

Well now, Spokane is well banked, let's put it that way, it doesn't need another bank, a new one to go in there on a new basis to make competition in that market. I also find here that this line of commerce business has got to extend a little bit, as has been testified. Fidelity, Washington Mutual, and the Lincoln Savings are real factors so far as the public is concerned, as are credit unions. Even stockbrokers like to get your money rather than put it in the bank where you get low interest. They like to tell you that you can invest in Amalgamated Used Cars and get high interest.

So that there is real competition not only between banks, commercial banks, and I find that to be the fact in the Spokane market, and I think that is, as you call it, a pro-competitive effect so far as competing with commercial banks is concerned, because if they try to get together or aren't competitive, then the savings and loans are going to get the money. That is my attitude.

Then let's go one step further, we'll take a little time here, the Spokane market, there is no doubt about that in my mind, I think the evidence is overwhelming, it is almost limited, certainly to the county, and more to just the metropolitan area of the city, as far as the market is concerned, I think there is evidence of that.

As far as this Washington Trust and N B of C merger affecting the Yakima or the Walla Walla or the other areas in the eastern part of the state in an

anti-competitive manner, I think the evidence is overwhelming to the effect that Spokane doesn't have any appreciable effect on what happens in the banking area in Walla Walla, or what happens in Yakima, or what happens in Wenatchee. I just don't think it has any effect at all, and I think the evidence supports that conclusion.

I see Washington Trust as a real competitor in the market, I don't think it is going to depreciate Washington Trust's competitive position in the market, I think if anything this will increase its competitive ability in the market.

This section of the country business that you talk about, the section of the country, if it is a section of the country, is Spokane County, if you want to call that a section of the country. I don't think the testimony supports any effect at all, nor any conclusion that the market extends outside that area. And you have already agreed on No. 9 where it says they are not in competition with each other. I don't think this is going to alter the degree of concentration in the market, in the Spokane market, in any significant degree, any more than it has, the fact that the two largest banks are in Seattle, or that the two largest banks meet in other areas. I just don't think the evidence establishes that.

As far as need is concerned, I think that a need has been established, and how great a degree I am not prepared to say, but there is a need, but I don't think it is necessary to show the need because I don't see any anti-competitive effect of the merger.

You can prepare the Findings and Conclusions in accordance with what I have said here, and if I haven't touched on any issues, tell me. Do you think I have touched them all?

As far as the stay is concerned, thirty days is not

going to make any great big problem I don't think. What I should do is write a memorandum decision of what I have said so you can just look it over and see just how I treat credibility and those types of things, and make your determination then whether you want to go forward with it.

But I just don't feel, Mr. Torre, that the people are going to get hurt. If I thought they were, I mean the fellow who is the average guy, if you want to use that term, I don't think he is going to get hurt, I just don't see it. If I felt that he was, you can be assured I would be deciding the case the other way, if I just thought the evidence showed it. If I thought he was going to get hurt in the future, I would certainly decide the case contrary to the way I have.

Now I don't know whether I have expressed my views sufficiently to permit or help you make your Findings. Do you think I have?

Mr. MOEN. I think you have, your Honor.

The COURT. You can prepare Findings and Conclusions, and I may write a memorandum, but I just don't think I will at the moment.

Mr. MOEN. Your Honor, I would like to move for dissolution of the statutory injunction, to be effective, say, ten days after the entry of Judgment, and that would give him ten days to file notice of appeal if they want to. There is no need for thirty days, they can make up their mind and file their notice. They have held this up now for eighteen months.

The COURT. Well, the trouble with that is, and I have had some experience with the Justice Department in the past, with government. You know once upon a time before I had this job I left a law firm and took a job as a United States attorney just on a temporary situation, and you are aware of that.

Mr. MOEN. Yes, your Honor.

The COURT. And it was real temporary, fortunately. But during the time I was there I had lots of experience with the Justice Department.

Mr. MOEN. Of course it will take a few days to prepare Findings.

The COURT. Well, there is another factor here that I take into consideration, it takes a little time for the Antitrust Division and Mr. Torre and the other people to get all over the situation, and I will give him a little time to think about it and talk about it.

Mr. MOEN. Are you suggesting thirty days after entry of Judgment?

The COURT. Well, I think that would be fair. Let them talk it over back there and decide whether Goodwin has committed reversible error, and whether as a matter of fact from the evidence here and the law, they could convince somebody else that I was wrong. They can talk it over, if they want to.

Mr. TORRE. Your Honor, just so I can get a time sequence——

The COURT. Well, thirty days after the entrance of Judgment. He is going to prepare the Findings and Conclusions. I may not agree with his Findings, he may not make them broad enough. I would like to have you show in there that I credit the testimony of Baxter and Haywood, and why I credit their testimony, because of my personal observation of them and the fact that I think they more adequately answered the questions that were proposed concerning the potential wings, and all the rest of it. Just put all that in there, will you?

Mr. MOEN. We will put that in, your Honor.

Mr. TORRE. And how much time does he have?

The COURT. To prepare the Findings?

Mr. TORRE. Yes.

The COURT. Well, I am not going to set a time limit

on him, because I think his clients will see that he gets out the Findings in a hurry, so I don't have to tell him.

Mr. MOEN. I will serve notice on Mr. Torre.

The COURT. All right, and then we can discuss them at some further time. Now I am not going to be here during the month of February, so you had better get them out in a hurry.

Mr. MOEN. I will, your Honor.

The COURT. And that will give you about three weeks.

Mr. TORRE. And Judgment will be entered after——

The COURT. After I look at those Findings. When I make a decision I don't like to have just cursory Findings, I want them to contain statements like I made here. I like to credit certain witness' testimony, and the reason I do it, and so forth, because when you decide a question on the facts, you want it to appear why you did that and why you felt the testimony of one witness was more credible than that of another.

All right, that will be all. Court will be at recess.

U.S. GOVERNMENT PRINTING OFFICE: 1973